IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8221 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1 & 2 YES; 3 to 5 NO

GUJARAT CANCER AND RESEARCH INSTITUTE

Versus

SANJAY CHANDRAKANT VYAS

Appearance:

MR DEVANG NANAVATI with MR D.G.SHUKLA
for NANAVATI & NANAVATI for Petitioner
MR TR MISHRA with MRS MADHUBEN SHARMA for Respondent

CORAM : MR.JUSTICE D.H.WAGHELA

Date of decision: 16/08/2001

ORAL JUDGEMENT

1. Under Articles 226 and 227 of the Constitution, the petitioner-Institute has challenged the award of the Special Labour Court, Ahmedabad in Reference (LCIDAT) No.248 of 1997 whereby the respondent-workman is ordered to be reinstated with full backwages with costs quantified at Rs.750/-. After the said impugned award was published on 6.8.1999 and the petition was filed and

admitted with the grant of ad-interim relief on 13.3.2000, the order of ad-interim stay against operation of the award was modified by the Court (Coram: H.K.Rathod, J.) by ordering the petitioner to pay full current wages with arrears with effect from 9.6.1999 upon receipt of an affidavit from the respondent stating that he was unemployed. The respondent was ordered to file such affidavit in compliance with the provisions of Section 17-B of the Industrial Disputes Act, 1947 (the `I.D.Act' for short). Thereafter, in an application seeking clarification of the order, the above order was modified to the extent that the respondent was required to file an undertaking to the effect that if the petitioner succeeds in the petition, the workman will repay the amount of difference between the last drawn wages and the regular current salary which was ordered to be paid. Then, upon the respondent filing a Civil Application for other and further benefits, such as, bonus, travelling allowances, leave travel concessions for himself and his wife etc., the petition was posted for final hearing.

2. The original dispute referred to the Labour Court arose from the demand of the respondent-workman to be reinstated with full backwages as he was discharged from service with effect from 16.4.1994. According to the case of the respondent, he was initially appointed as a junior stenographer on probation for a period of six months from 2.3.1993. His work was appreciated by some of the doctors by written letters. At the end of the probationary period of six months, instead of being confirmed in service, the period of probation was extended by a further period of six months by the petitioner. There were no complaints against the petitioner even during the extended period of probation, but apprehending termination of his service, the respondent had approached the Civil Court by way of a civil suit and obtained an injunction under which he continued in service till 16.4.1994. Upon vacation of the injunction granted by the Civil Court, the respondent had also approached this Court by way of Special Civil Application No.5348 of 1994, which was subsequently withdrawn. Thus, the grievance of the respondent was that his service was terminated without any reasonable cause and in violation of the provisions of Sections 25F, 25G and 25H of the I.D.Act.

2.1 The petitioner-employer relied upon the express conditions in the appointment order of the respondent, according to which, if the work and conduct of the workman were found to be satisfactory during the

probation period, he was to be confirmed by giving specific order in writing and if they were not found satisfactory, his service was liable to be terminated without assigning any reasons and without any notice. It was further stipulated that the workman may be given an opportunity to improve his work and conduct by extending the period of probation for one year. Relying on these express conditions of service, by office order dated 27.8.1993, the period of probation was extended by six months upto 1.3.1994. As at the time of expiry of that period the respondent was protected by an injunction of the Civil Court, he was continued in employment till that stay operated and that fact was intimated to the respondent by office order dated 1.3.1994. Thereafter, as seen earlier, upon vacation of the injunction, the petitioner had relieved the respondent on 16.4.1994 and, without prejudice to the contention that the respondent was working under the extended probationary period and not entitled to retrenchment compensation, by way of abundant caution, an amount of Rs.4,309/- was offered as notice pay and retrenchment compensation. The petitioner is stated to have its own service rules, namely, Gujarat Cancer & Research Institute Employees' Service (Discipline and Conduct) Rules, 1992, according to which, its employees were classified as permanent, probationer, temporary, part-time and casual. According to Rule 6 (b) of those Rules, a probationer is defined as "an employee who is provisionally employed on trial basis to be considered for permanent vacancy or post and has not completed probationary period fixed for him in that behalf and who has not received letter of confirmation in service from the Director....."

3. Against the background of facts as above, the Labour Court appears to have addressed itself to the task of deciding whether it was a case of retrenchment, whether the retrenchment was legal and whether the respondent should be ordered to be reinstated. Relying upon the fact that the respondent had completed 240 days of service and the petitioner was employing more than 100 employees, it is held in the impugned award that the provisions of Sections 25N and 25K of the I.D.Act were applicable. It is observed that the Service Rules of the petitioner did not provide for any time-limit within which a probationer had to be confirmed in service. The Labour Court also found that there was nothing on record to suggest that the conduct or performance of the respondent was not satisfactory during the period of probation. The petitioner had sought to prove its reasons for being dissatisfied with the service of the respondent. But such oral and documentary evidence was

discarded while holding that the mistakes or lapses committed by the respondent were of technical nature and the service record of the respondent was otherwise clean. The Labour Court heavily relied upon the fact that the management itself had extended the period of probation, that other stenographers junior to the respondent were retained or confirmed in service and that the extension of the probation itself was unjustified as the appointment of the respondent was required to be confirmed. In this context, it is also observed that, in the name of expiry of probation period, retrenchment of the respondent amounted to causing his economic death which was not proper, just or humane.

4. Assailing the above award, the learned counsel for the petitioner submitted that the termination of service of the respondent was bona fide and strictly in accordance with the stipulation contained in that behalf in the appointment order. That it was not necessary to give any reason for not confirming the respondent or for not renewing the contract of service. It was also submitted that the order by which the respondent was discharged from service did not contain any charge of stigma and the termination was neither by way of retrenchment nor as a measure of punishment. The termination was squarely covered by the exception clause provided in Section 2(oo) (bb) of the I.D.Act, according to the submission. The learned counsel relied upon the judgment of the Supreme Court in M.VENUGOPAL v. DIVISIONAL MANAGER, LIFE INSURANCE CORPORATION OF INDIA [(1994) 2 SCC 323] wherein (in a case of termination of service of a probationer) it is observed as under:

> ".....Any such termination, even if the provisions of the Industrial Disputes Act were applicable in the case of the appellant, shall not be deemed to be "retrenchment" within the meaning of Section 2 (oo), having been covered by exception (bb). Before the introduction of clause (bb) in Section 2 (oo), there were only three exceptions so far as termination of the service of the workman was concerned, which had been excluded from the ambit of retrenchment (a) voluntary retirement; (b) retirement on reaching the age of superannuation; and (c) on ground of continued ill-health. This Court from time to time held that the definition of "retrenchment" being very wide and comprehensive in nature shall cover, within its ambit termination of service in any manner and for any reason, otherwise than as a punishment inflicted by way of disciplinary

> action. The result was that even discharge simpliciter was held to fall within the purview of the definition of "retrenchment". [State Bank of India v. N.Sundara Money (1976) 1 SCC 822), Santosh Gupta v. State Bank of Patiala (1980) 3 SCC 340]. Now with introduction of one more exception to Section 2 (oo), under clause (bb) the legislature has excluded from the purview of "retrenchment" (i) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry; (ii) such contract being terminated under a stipulation in that behalf contained in contract of employment. It need not be impressed that if in the contract of employment no such stipulation is provided or prescribed, then such contract shall not be covered by clause (bb) of Section 2 (oo). In the present case, the termination of service of the appellant is as a result of the contract of employment having been terminated under the stipulations specifically provided under Regulation 14 and the order of the appointment of the appellant. In this background, the non-compliance of the requirement of Section 25-F shall not vitiate or nullify the order of termination of the appellant."

4.1 The learned counsel also relied upon the judgment of the Supreme Court in OSWAL PRESSURE DIE CASTING INDUSTRY v. PRESIDING OFFICER [(1998) 3 SCC 225] wherein it is held that it was not open for the Court to sit in appeal over the assessment made by the employer of the performance of the employee. Once it was found that the assessment made by the employer was supported by some material and was not mala fide it was not proper for the Court to interfere and substitute its satisfaction with the satisfaction of the employer. The approach of the High Court in expecting some evidence and material to show the performance of the workman to be below the expected norms was also deprecated.

4.2 The judgment of the Supreme Court in KEDAR NATH BAHL v. THE STATE OF PUNJAB [AIR 1972 SC 873] was also relied upon in support of the submission that where a person is appointed as a probationer in any post and the period of probation is specified, it does not follow that at the end of the said specified period of probation he obtains confirmation automatically.

5. In a recent judgment of the Supreme Court in

KRISHNADEVARAYA EDUCATION TRUST v. L.A.BALAKRISHNA [2001 AIR SCW 253], it is observed that normally services of an employee on probation would be terminated when he is found not to be suitable for the job without assigning any reason and it is normally preferred that the order itself does not mention the reason. However, if such an order is challenged, the employer will have to indicate the grounds on which the service of probationer was terminated. It is in terms held that the probationer is on test and if his services are found not satisfactory, the employer has, in terms of the letter of appointment, the right to terminate the service.

6. The learned counsel for the respondent-workman argued that the impugned order of termination was, ex facie, mala fide and the petitioner itself having followed the provisions of retrenchment in offering retrenchment compensation, it cannot be heard to say that the termination was not by way of retrenchment. It was further argued that although the order of appointment is couched in innocuous terms, it was not supported by any allegations impinging upon the efficiency and performance of the respondent. The learned counsel relied upon the ratio of the judgment in V.P.AHUJA v. STATE OF PUNJAB [2000 AIR SCW 792] wherein it is held that termination order founded on the ground that the probationer had failed in the performance of his duties was, ex facie, stigmatic; and such order could not have been passed without holding a regular enquiry and giving an opportunity of hearing to the probationer. In the facts of that case, the probationer was discharged with an order which, inter alia, stated that he had failed in the performance of his duties administratively and technically. The case was fully covered by the decision of the Supreme Court in DIPTI PRAKASH BANERJEE v. SATVENDRA NATH BOSE NATIONAL CENTRE FOR BASIC SCIENCES, reported in AIR 1999 SC 983. The detailed discussion on the subject in the aforesaid decision of the Supreme Court in DIPTI PRAKASH BANERJEE v. SATVENDRA NATH BOSE NATIONAL CENTRE FOR BASIC SCIENCES can be found in para 22 of the judgment which reads as under:

" If findings were arrived at in inquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as 'founded' on the allegations and will be bad. But if the inquiry was not held, no finding were arrived at and the employer was not inclined to conduct an inquiry but, at the same time, he did not want to continue the employee against whom

> there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to inquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegation would be a motive and not the foundation and the simple order of termination would be valid."

In the facts of that case, the order of termination referred to certain orders which contained the material which might amount to stigma. In the context of those facts, it was held that the words amounting to stigma might not be contained in the order of termination itself but may also be contained in an order or proceeding referred to in the order of termination or in an annexure thereto which might vitiate the order of termination.

7. It was also argued on behalf of the respondent that the appointment of the respondent on probation initially for a period of six months as also the extension of the probation for a further period of six months was by itself inconsistent with the Model Standing Orders. It could not, however, be shown as to whether and how the provisions of the Industrial Employment (Standing Orders) Act, 1946 or Model Standing Orders prescribed thereunder were applicable in the facts of the present case.

8. The restrictive provisions relating to retrenchment are not applicable in the facts of the present case as the termination of service of the respondent was squarely covered by the exception clause added to the definition of "retrenchment" in Section 2 (oo) (bb) of the I.D.Act. This is both a case of termination of service of a workman as a result of non-renewal of contract of employment and the contract being terminated under an express stipulation in that behalf contained in the contract. Therefore, the finding of the Labour Court to the effect that the provisions of Sections 25F, 25G and 25H of the I.D.Act were violated is incorrect. It is also seen in the judgment of the Supreme Court in OSWAL PRESSURE DIE CASTING INDUSTRY (supra) that the Court cannot substitute its own satisfaction for the satisfaction of the employer who decided to extend the period of probation or not to confirm the employee in service on completion of the period of probation. On this aspect of the matter, it was also pointed out, on behalf of the petitioner, from the deposition of the respondent himself that he had

admitted to have committed a number of mistakes in carrying out the typing work assigned to him. In such circumstances, it was for the employer to decide whether to tolerate such mistakes and give further opportunity to the workman to improve his performance. However, pointing out such mistakes before the Labour Court cannot in any way be said to be casting stigma upon the respondent. In this view of the matter, the Labour Court appears to have misdirected itself in examining the question whether the petitioner ought to have confirmed the respondent in service instead of firstly extending the period of probation or lastly terminating his service.

9. In the facts and for the reasons discussed hereinabove, the termination of service of the respondent is neither retrenchment nor by way of punishment. There is no evidence or material on record suggesting that the period of probation was extended by the petitioner with an ulterior motive or with an intention to deny to the respondent the benefits of permanency in service. Therefore, the observations in that regard in the impugned award are baseless and perverse. Accordingly, the impugned award is not sustainable in law and therefore hereby set aside.

In absence of any submissions on the issue and in the peculiar facts and circumstances, the respondent shall not be required to refund any amount which might have been paid under the earlier interim orders of this Court granting the additional benefit of wages at the current rates. Rule is made absolute accordingly with no order as to costs.

Sd/-

16.8.2001 (D.H.Waghela, J.)

(KMG Thilake)